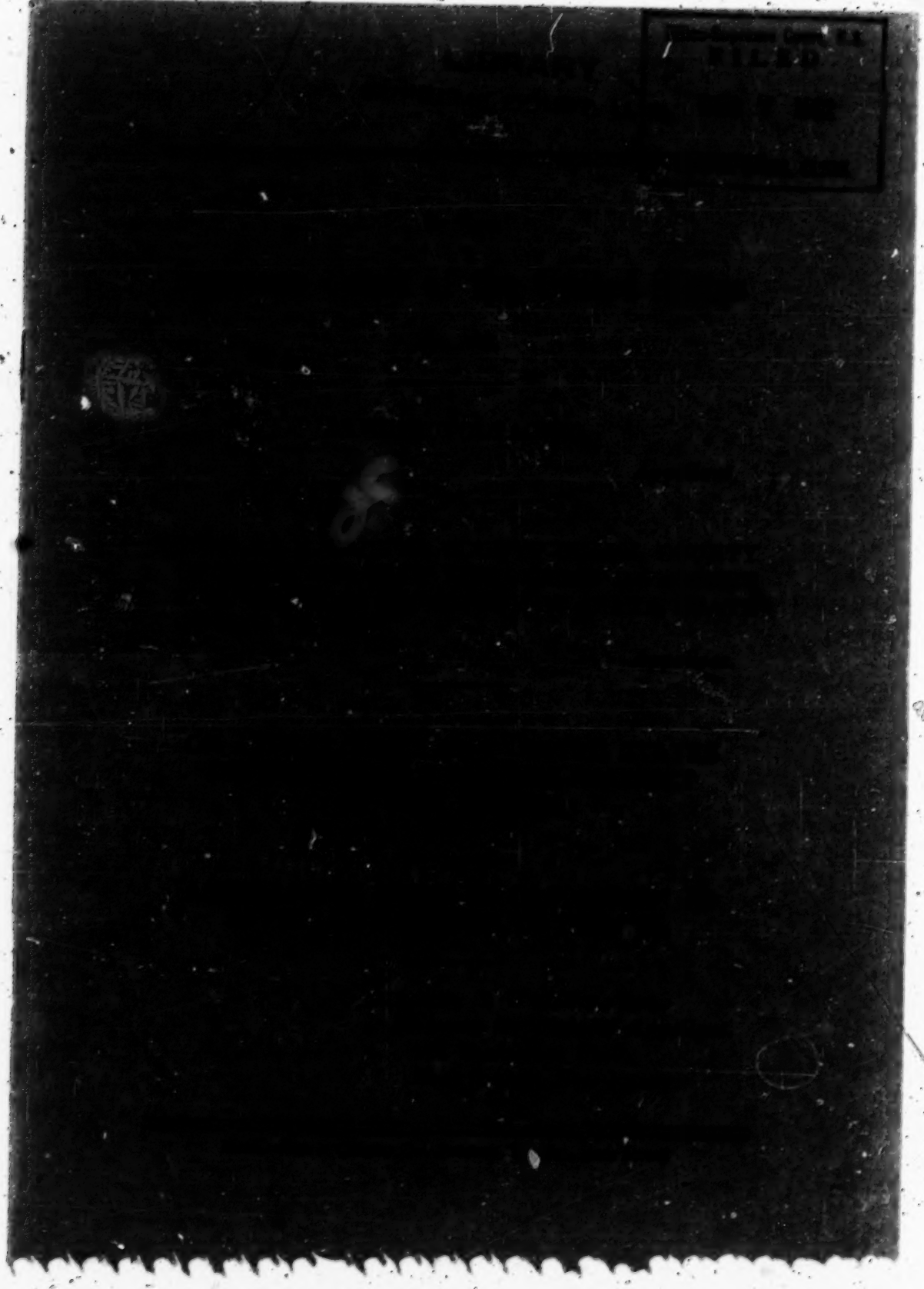

INDEX.

	PAGE
Introduction	1
The Questions are Timely Raised	2
The Questions are Substantial	3
The Question of Denial of Equal Protection with Respect to Party Name and Principle is Substantial	4
The Question Pertaining to Delegation of Power to the County Clerk to Regulate the Manner of Federal Elections is Substantial	6
The Question of the Constitutionality of those Statutes Placing the Major Political Parties in First Position on the Official Ballot and Denying Plaintiff an Equal Opportunity Thereto is Substantial	7
Conclusion	9
Proof of Service	9

CASES.

Aurelio v. *Cohen*, 291 N. Y. 176, 51 N. E. 2d 695 (1943)	8
Baker v. *Carr*, 369 U. S. 186 (1961)	3
Crane v. *Voorhis*, 257 N. Y. 298, 178 N. E. 169 (1931)	8
Funk & Wagnalls v. *Stamm*, 85 N. J. L. 301, 88 A. 1050 (E. & A. 1913)	2

PAGE

Hawkes v. *Gates*, 129 N. J. L. 5, 28 A. 2d 50 (Sup. Ct. 1942) 6

Hoffman, In re, 134 N. J. L. 155, 46 A. 2d 446 (Sup. Ct. 1946) 6

Mac Dougall v. *Green*, 335 U. S. 281, 69 S. Ct. 1, 93 L. Ed. 3 (1948) 7, 8

Perry v. *Guiliano*, 46 N. J. Super. 550, 135 A. 2d 24 (1957) 6

Ray v. *Blair*, 343 U. S. 214 (1952) 5

Schechter Poultry Corporation v. *United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947 (1934) 6

Smiley v. *Holm*, 285 U. S. 355 (1932) 6

State v. *Swift*, 101 N. H. 340, 143 A. 2d 114 (1950) 2, 4

CONSTITUTION.

U. S. Constitution, amend XIV 5

IN THE

SUPREME COURT OF THE UNITED STATES.

SAMUEL VOLTAGGIO,
Plaintiff-Appellant,

vs.

NICHOLAS V. CAPUTO, County Clerk, County of Essex, State of New Jersey and ROBERT J. BURKHARDT, Secretary of State, State of New Jersey,
Defendant-Appellees.

Civil Action.

On Appeal.
Brief in Opposition to Appellee's Motion to Dismiss.

INTRODUCTION.

Appellant, Samuel Voltaggio, submits the within brief opposing the Motion To Dismiss This Appeal by Appellee, Nicholas V. Caputo, Essex County Clerk, State of New Jersey, upon the grounds that the movant has failed to adequately establish his position that the questions are not timely raised and that they are not substantial.

THE QUESTIONS ARE TIMELY RAISED.

In order to prevail on this point the appellee must show not only a delay, but also an injury to the interest of the County of Essex. In fact, any delay in prosecuting this civil action has worked in appellees' favor, rather than to their disadvantage.

The only party injured by the delay in prosecution was the appellant himself; and only he may raise a question of untimeliness. It is well to note that the period of delay complained of is a mere six months from the time appellant's nominating petition was filed with the Secretary of State. The appellee having failed to show an injury, has no standing to assert untimely prosecution.

Appellee's conclusion that the occurrence of the General Election on November 6, 1962 rendered the questions presented on this appeal moot is unsupported by legal authority, and ought not be considered by this Court in the absence thereof. A question rendered moot on appeal has been defined by the highest Court in New Jersey as one where an abstract question is sought to be determined, which is not based upon existing facts, but upon a factual conclusion unsupported by evidence in the particular case. *Funk & Wagnalls Co.* v. *Stamm*, 85 N. J. L. 301, 88 A. 1050 (E. & A. 1913). Even where a question appears to be moot in nature, an appellate tribunal will decide its legal effect where it touches upon the public interest in a substantial degree. *State* v. *Swift*, 101 N. H. 340, 143 A. 2d 114 (1950).

These vital questions of election law must eventually be settled. By this civil action and appeal, the plaintiff-appellant affords the opportunity for complete judicial settlement of questions which are of substantial importance and which face every candidate nominated by petition in the State of New Jersey and in other States. Within two

years time, a general election for the very same federal office will occur and independent candidates in that election will face the very same legal questions raised by this appeal. To dismiss this appeal, without opinion on the instant motion, creates grave uncertainty of the rights of candidates in future elections. These candidates in order to secure their rights will be forced to re-litigate these very same issues. Such a result constitutes multiplicity of suits, which is always a ground for the equitable relief here sought.

Appellant's lack of success in the November 6, 1962 General Election is not a factor rendering the appeal moot. Appellant fully intends, barring unforseen circumstances, running as a candidate in the next General Election for this same office. A dismissal of the present appeal would require him at that time to re-litigate the entire case, and at great personal expense. Therefore his rights as a candidate, remain in question and preclude the determination by this Court that the appeal be dismissed upon grounds of mootness.

THE QUESTIONS ARE SUBSTANTIAL.

The introduction by appellee of the issue of mootness, as in the question of untimeliness, is likewise unsupported by legal authority to sustain such a conclusion. Appellant again urges that that issue should not be considered unless appellee has established his legal right to a dismissal on this basis, which in fact he has failed to do. In response to the issue, the cases cited *supra* under the point regarding timeliness are offered in rebuttal.

This Court in *Baker v. Carr*, 369 U. S. 186 (1961) has held that a qualified voter has a sufficient interest to prosecute an action, the object of which is to declare the constitutionality of a State election law. Having conceded that appellant has that interest (Appellee's Brief p. 6), it is sub-

mitted that the occurrence of the election is no bar to the prosecution of this appeal. His legal rights as a voter are still at issue in an actual controversy and therefore the questions presented are not moot.

Appellants Jurisdictional Statement, p. 8, clearly reflects that the questions presented affect every voter in our nation and therefore this Court should not dismiss the appeal on a question of mootness in the face of such widespread importance. *State v. Swift*, 101 N. H. 340, 143 A. 2d 114 (1950).

The remainder of appellee's brief on this motion is devoted to a theory that the questions are not substantial (Appellee's Brief p. 4 *et seq.*). However, rather than argue the substance of the questions in an effort to disprove their importance, appellee devotes this portion of his brief to an argument of the merits of the case. Appellant's Jurisdictional Statement is specifically confined to the question of the importance of the questions presented, rather than an elaborate statement setting forth theories which bear on their legal solution. With this in mind, the following is a succinct rebuttal of the argument presented by Appellee's Brief, only insofar as the same relates to the substance and importance of the questions presented in Appellant's Jurisdictional Statement; inasmuch as this is the only question before the Court at this stage of the proceedings.

THE QUESTION OF DENIAL OF EQUAL PROTECTION WITH RESPECT TO PARTY NAME AND PRINCIPLE IS SUBSTANTIAL.

Notwithstanding appellee's argument on the merits of this point, the fact remains that this is a question of federal law which has yet to be passed upon, by this or any other Court. Appellee's argument fails to account for the wide scope of importance as evidenced by statutes similar to the

provision in question, enacted into law by our sister states. (Jurisdictional Statement, p. 10).

The case of *Ray* v. *Blair*, 343 U. S. 214 (1952) cited by the appellee, (Appellee's Brief, p. 6), does not minimize the importance of the question here presented. Nor would that case require plaintiff, by his vote in the primary election, to support *any* candidate in *any* election. Inasmuch as the appellant was not a party nominee, appellee's conclusion that New Jersey could require him to support the Democratic candidate, is a mere conclusion inaccurately drawn from the facts and holding of *Ray* v. *Blair, supra.*

No implication should be drawn from appellant's Jurisdictional Statement, that political parties are given an unrestricted right to use a political slogan, as is asserted by appellee (Appellee's Brief, p. 6). The problem presented is simply that the entire wording of the name of a political party is completely foreclosed from use in the slogans of other candidates; and this, is submitted to be a denial of the equal protection of the law. U. S. Const., amend XIV.

While the appellee concedes there is no case relating to the constitutional issue at hand, he asserts unauthoritatively in the very next sentence that a "constitutional minimum" exists. (Appellee's Brief, p. 7). Can these two statements be reconciled, or do they merely point to the confusing status of the issue and show the dire necessity of a judicial pronouncement on the merits? Appellant submits that plenary consideration would lend certitude with respect to this issue.

Although a voter might expect the name of a Democratic candidate to appear first on the ballot, appellee offers no legal authority to sustain its position (Appellee's Brief, p. 7) that that party has atained a prescriptive right to that position.

THE QUESTION PERTAINING TO DELEGATION OF POWER TO THE COUNTY CLERK TO REGULATE THE MANNER OF FEDERAL ELECTIONS IS SUBSTANTIAL.

As reflected in appellant's Jurisdictional Statement, p. 14, a fair question of interpretation exists as to whether discretion is vested in the Appellee-County Clerk to determine ballot positions of candidates in federal elections.

Despite appellee's contention that no discretion lies within the County Clerks authority, it cannot rebut the express language contained in *Perry* v. *Guiliano*, 46 N. J. Super. 550, 135 A. 2d 24 (1957) to the effect that such discretion exists. Likewise appellee overlooks the long line of decisions cited in support of that court's decision. See *Hawkes* v. *Gates*, 129 N. J. L. 5, 28 A. 2d 50 (Sup. Ct. 1942); *In re Hoffman*, 134 N. J. L. 155, 46 A. 2d 446 (Sup. Ct. 1946).

The case of *Smiley* v. *Holm*, 285 U. S. 355 (1932) is not decisive of the issue, *sub judice*. On the contrary, that case merely decided that a state legislature could not unilaterally, without benefit of normal legislative procedure, regulate the manner of federal elections. Appellant's position is in accord with that holding. What is sought here is a determination that the power to regulate is nondelegable in nature, and that its exercise must be by duly enacted statutes, rather than by the whim of a ministerial officer. As to appellee's statement of the purview of the authority of the State to delegate its law making function (Appellee's Brief, p. 12) it is well to note that such power is limited to a lawful delegation and one with adequate standards. *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947 (1934).

THE QUESTION OF THE CONSTITUTIONALITY OF THOSE STATUTES PLACING THE MAJOR POLITICAL PARTIES IN FIRST POSITION ON THE OFFICIAL BALLOT AND DENYING PLAINTIFF AN EQUAL OPPORTUNITY THERETO IS SUBSTANTIAL.

Although appellee adequately considers, and lauds, the New Jersey statutory scheme governing the recognition of a major political party (Appellee's Brief, p. 13), he fails to give a satisfactory and reasonable explanation for the patent discrimination on the face of the statutes here under attack, which preserve the first row positions to such major political parties on the ballot.

Can the legislature so favor major political parties in federal elections, without an adequate reason? It is appellant's position that the exercise of the legislative function must be based in reason and necessity. (Jurisdictional Statement, p. 11).

Reliance upon the *per curiam* opinion of this Court in *Mac Dougall* v. *Green*, 335 U. S. 281, 69 S. Ct. 1, 93 L. Ed. 3 (1948) does not conclusively decide the issues presented at bar. In the first place, three members dissented in an exhaustive and authoritative opinion. Secondly, a concurring opinion by Mr. Justice Rutledge was solely upon the ground that any injunction would interfere with the orderly process of the election in that case, by reason of only twelve days remaining between the date of decision and the date upon which the election was to be held. Since such a time consideration is absent in the case at bar, a decision upon the merits would afford this Court ample opportunity to render an authoritative opinion, which would strengthen the weakness in the *Mac Dougall* case, occasioned by this concurring vote.

Appellee offers other sections of the Revised Statutes of New Jersey, which provide for publication and distribution of sample ballots (Appellee's Brief, p. 14) as being indicative of the advantages afforded independent candidates. But these same provisions equally benefit the major poli-

tical parties as well. Furthermore they are an unsatisfactory explanation for the patent discrimination which results from the operation of these acts. They fail to supply a reason for such preferences.

The success of one candidate in an election in a foreign jurisdiction is offered to substantiate the conclusion that one ballot position is as attractive as another (Appellee's Brief, p. 15). It is worthy of note that appellee mentions no similar success in our own state. The very election which gave rise to the instant case constitutes a factual contradiction to the election of Vincent Impelliteri in New York City. The poll of votes in the instant election revealed that the candidate appearing on the first row received the greatest number of votes, and the remaining candidates received lesser votes, *in the order in which they appeared on the ballot.*

Appellee offers again a non-authoritative statement that the major political parties have acquired a prescriptive right to appear on the first row or rows. Yet this statement meets considerable opposition in the dissent of Mr. Justice Douglas, in *Mac Dougall* v. *Green*, 335 U. S. 281, 61 S. Ct. 1, 93 L. Ed. 3 (1948) wherein it was stated:

> "The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government." 335 U. S. 281 at 288, 289, 290, 61 S. Ct. 1, 93 L. Ed. 3 at 9, 10 (1948).

The cases of *Crane* v. *Voorhis*, 257 N. Y. 298, 178 N. E. 169 (1931) and *Aurelio* v. *Cohen*, 291 N. Y. 176, 51 N. E. 2d 695 (1943) both stand for the proposition that there must be no unnecessary discrimination between the independent candidate and the party voter in respect of the facilities offered.

Therefore appellee has not sustained his burden of satisfying this Court that the questions presented by this appeal are not substantial. Even appellee's discussion of the merits fails to substantiate the position taken.

CONCLUSION

For the reasons stated it is respectfully submitted that the Supreme Court of the United States deny appellee's Motion To Dismiss this appeal, and that plenary consideration be granted on the merits.

Respectfully submitted,

ABRAHAM I. HARKAVY,
Counsel for Plaintiff-Appellant,
100 Evergreen Place,
East Orange, New Jersey.

PROOF OF SERVICE.

I, Abraham I. Harkavy, Attorney for Samuel Voltaggio, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on DEC 4 1962 I served copies of the foregoing Brief Opposing Appellee's Motion To Dismiss on the several parties thereto, as follows:

1. On Nicholas V. Caputo, County Clerk of the County of Essex, and Robert J. Burkhardt, Secretary of State, State of New Jersey, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To Nicholas T. Fernicola, Esq., attorney for appellee Nicholas V. Caputo, at Hall of Records, Newark, New Jersey.

To Arthur J. Sills, Esq., attorney for appellee Robert J. Burkhardt, at State House Annex, Trenton, New Jersey.

DEC 4 1962